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No. _____

In The

Supreme Court of the United States

October Term, 1993

RICHARD G. WHITE AND BARBARA WHITE,

Petitioners,

v.

BROWNING-FERRIS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can there be joint and several liability between an employer under the Americans with Disabilities Act and a tort-feasor for the same damage, or does the Americans with Disabilities Act preempt State tort law?

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PETITION FOR WRIT OF CERTIORARI

Richard G. White and Barbara White petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (5th Cir. 1994) (Appendix, *infra*, App. 1) was not published and is reported as 15 F.3d 1078. The District Court opinion (Appendix, *infra*, App. 3) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the construction and application of the Americans With Disabilities Act (42 U.S.C. § 12101, et seq.) (hereinafter referred to as ADA) and the regulations implementing the ADA (29 CFR § 1630.1, et seq.). The cited provisions are lengthy, however, the most pertinent part of the provisions is 29 CFR § 1630.1(c)(2), which states:

> "*Relationship To Other Laws.* This part does not invalidate or limit the remedies, rights and procedures of any federal law or of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this part."

This case also involves Louisiana's general tort statute, LA. C.C. Art. 2315, which provides in pertinent part:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. . . . "

STATEMENT

On April 26, 1991, Richard White was injured in an automobile accident when a Browning-Ferris, Inc. (hereinafter referred to as BFI) garbage truck attempted to make a left turn across his lane of travel. Suit was originally filed in Louisiana State Court, but the defendant, BFI, removed to Federal District Court based on diversity of citizenship.

As a result of the accident, Mr. White underwent a two-level cervical fusion. At the time of the accident, Mr. White had been employed as a project engineer for Citgo (an oil refinery) for thirty-eight years. Mr. White attempted to return to his job at Citgo after his surgery, but Citgo refused to allow him to return because of restrictions placed upon his physical activities by his treating physician; Citgo eventually placed Mr. White on disability retirement.

A bench trial resulted in the Court finding BFI 100% at fault in the accident and awarding Mr. White $80,000 in general damages, plus his medical expenses and past wage loss up until the time that Citgo refused to allow Mr. White to return to work. The future wage loss claim was denied because the Court felt that Citgo had violated the ADA in refusing to allow Mr. White to return to work.

The Trial Court found that Citgo had personnel available who could accommodate Mr. White in performing the physical tasks that he could no longer perform in connection with his job. Further, the Court found that the ADA required Citgo to make these accomodations, and because they were not made, it was Citgo, not BFI, that was legally at fault for Mr. White losing his job.

The Trial Court's Ruling (App., *infra*, 3a) contains the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

> . . . "8. On November 5, 1992, Dr. Foster commented that Mr. White was doing quite well and he discharged him to return to work as of November 12, 1992 with limitations on climbing of ladders and overhead lifting.
>
> 9. Since the accident, Mr. White can no longer perform any physical activity that is strenuous or that involves any sort of stress on the neck area, such as lifting or turning his head sharply one direction or the other; his ability to perform household-type chores and yard work has been greatly reduced."

The Trial Court went on to deny Mr. White's wage loss claim resulting from the loss of his job because the Court felt that Citgo had violated the ADA in not allowing Mr. White to return to work, and, therefore, BFI could not be held liable.

In a two-page unpublished opinion, the U.S. Fifth Circuit Court of Appeals "AFFIRMED" the Trial Court Judgment as being not "clearly erroneous".

REASONS FOR GRANTING THE WRIT

There is no case law that directly addresses the question presented by this writ application, however, it seems clear that the ADA was not intended to preempt State tort law remedies that are otherwise available to tort victims.

First, the regulations promulgated pursuant to the ADA expressly state that they do " . . . not invalidate or limit the remedies, rights, and procedures of any . . . State . . . that provide greater or equal protection for the rights of individuals with disabilities than are afforded by this part." 29 CFR § 1630.1(c)(2).

It seems clear from the wording of the ADA that it is not intended to preempt or otherwise limit an individual's right to pursue remedies that may be available to him under State tort law. Since it seems clear that the remedies afforded by the ADA are not exclusive, then a violation of the ADA should not relieve a tort-feasor of responsibility it otherwise has to a tort victim.

The Trial Court's Ruling in this matter effectively held that the ADA preempted any rights that Mr. White otherwise had under State tort law.

The remedies available under the ADA have *not* been held to be exclusive by at least one Court that has examined the question. In *Brewer v. New United Manufacturing, Inc.*, 1994 WL 10020 (N.D. Cal. 1994), the plaintiff was discharged from her job. She stated two causes of action in her lawsuit: One was in tort for wrongful termination based on public policy, and the second was brought under the ADA.

The defendant employer removed the action to Federal Court based on federal question doctrine. Because the plaintiff failed to properly follow administrative procedures necessary in order to bring an action under ADA, the District Court dismissed that claim. The Court did not, however, dismiss the plaintiff's entire lawsuit.

Rather, the District Court remanded the case to State Court for litigation of the wrongful discharge claim.

Had an action under ADA been the plaintiff's exclusive remedy, the District Court would have dismissed the entire lawsuit rather than remand the remaining cause of action.

BFI'S RESPONSIBILITY UNDER LOUISIANA TORT LAW

"But for" the negligent conduct of BFI, Mr. White would still have his job with Citgo. This sufficiently meets Louisiana's test for "causation". *Roberts v. Benoit*, 605 So.2d 1032 (La. 1991).

A tort-feasor takes the plaintiff as he finds him and is liable for all natural and probable consequences of his conduct. *Finley v. Bass*, 478 So.2d 608, 613 (La. App. 2nd Cir. 1985).

A somewhat analogous situation is where a tort victim suffers *additional* injury because of medical malpractice. When this occurs, the original tort-feasor is liable for the subsequent damages resulting from the medical malpractice. *Doyle v. Picadilly Cafeterias*, 576 So.2d 1143 (La. App. 3rd Cir. 1991). In the case at hand, Citgo is liken to the negligent doctor. Hence, BFI should be held responsible for Mr. White's job loss.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or

damage; and that the injury or damage was either a direct result, or a reasonably probable consequence, of the act or omission.

It is well settled in Louisiana that an intervening act does not automatically absolve a prior negligent party from liability, especially where there is an ease of association between the acts of the defendant despite the intervening conduct of the third parties. *Roberts,* supra.

It seems evident that BFI's negligence "played a substantial part" in bringing about the loss of Mr. White's job; the "ease of association" between the defendant's negligence and the job loss is clear. BFI should be held liable for Mr. White's job loss regardless of any ADA violation by Citgo.

The Appellate Court's decision in this matter upheld a District Court Judgment that effectively held that the ADA preempts any otherwise concurrent rights of recovery that a plaintiff may have under State law.

This issue has not been addressed by any other Court of Appeals or the United States Supreme Court. Until the issue is settled, any time a tort victim is discharged from his job as a result of injuries caused by the tort-feasor, the tort victim will have to include his employer as a defendant along with the tort-feasor. All of these suits would have to be filed in Federal Court because the ADA necessarily involves "a Federal question".

The necessity of having to include the plaintiff's employer in any suit against a tort-feasor where the plaintiff ultimately lost his job because of injuries related

to the accident raises other significant issues. What happens from a procedural standpoint when the plaintiff is discharged from his job during the course of litigation against the tort-feasor? Is the initial litigation put on "hold" while the plaintiff/employee pursues the prerequisite administrative hearing so that the employer can then be brought into the suit? Once the suit against the employer is filed in Federal Court, does the plaintiff have to dismiss his State Court tort action so that the entire matter can be heard in Federal Court; are there going to be prescription problems?

CONCLUSION

It is respectfully submitted that the question presented by this application is "ripe" for decision and that the resolution of this question now will serve to avoid substantial unnecessary litigation in the future any time a tort victim loses his job as a result of injuries resulting from the tort-feasor's negligence.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5207
Summary Calendar

RICHARD G. WHITE
and
BARBARA WHITE,

Plaintiffs-Appellants,

VERSUS

BROWNING-FERRIS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CV-958)

(FILED JAN 27 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

This is a simple diversity case resulting from an automobile accident. The matter was tried to the court,

---

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

which found the defendant one hundred percent liable and awarded damages of $122,165.83.

The court explained its reasons in a careful, seventeen-page opinion setting forth its findings of fact and conclusions of law. The plaintiff, on appeal, challenges only the amount of the award as to certain elements.

We affirm, essentially for the reasons given by the district court. As it should have done, the court made credibility determinations and carefully weighed the evidence. We uphold such findings unless they are clearly erroneous. There is no such clear error here, as the district court's determinations are a permissible view of the evidence. The award is substantial and fair, although not what the plaintiff had hoped for.

The judgment is AFFIRMED.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

RICHARD G. WHITE, ET UX	)	CV 92-0958-LC
VERSUS	)	JUDGE TRIMBLE
BROWING-FERRIS, INC.	)	MAGISTRATE WILSON

RULING

(Filed Aug. 6, 1993)

This matter was tried before the undersigned in the United States Courthouse located in Lake Charles, Louisiana. The plaintiffs, Richard G. and Barbara White, brought suit against Browning-Ferris, Inc. ("BFI") seeking recovery for damages arising out of an automobile accident on April 26, 1992. Plaintiff alleges that he collided with a large BFI garbage truck driven by Amelia Gary when, without any warning or signal, the truck turned across Mr. White's lane of travel. Subject matter jurisdiction for this case is based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

The parties offered exhibits at trial consisting of various medical records, a summary of medical expenses, and two exhibits depicting the accident scene. Testimony at trial consisted of the following: the two plaintiffs, Richard and Barbara White; Richard White's treating physician, Dr. William Foster (presented through two deposition transcripts); and Amelia Gary, the BFI driver (also presented by deposition transcript). Since trial, the

parties have supplemented the record with the deposition testimony of several expert witnesses: Glen Hebert, a vocational consultant retained by the Whites; Charles Bettinger, an economist retained by the Whites; and John Grimes, a vocational consultant retained by BFI.

SETTING

Mr. White testified that on April 26, 1991, he was operating his 1988 Ford Ranger pick-up truck in a southbound direction on Louisiana Highway 108 on his way back to work from lunch. It had been raining and the road was wet. White crossed the Interstate 10 overpass in the right-hand lane of travel on this 4-lane roadway, but immediately upon reaching the south embankment of said overpass, White changed back to the left-hand lane.[1] The right-hand lane, on the overpass, was for merging traffic to enter Highway 108 in a southerly direction. Traffic intending to exit Highway 108 and to enter Interstate 10 eastbound would remain in the right-hand lane.

Meanwhile, Gary's July 17, 1992, deposition reveals that she was operating a 1988 Ford garbage truck in the course and scope of her employment with BFI. Gary had driven the BFI truck on the Interstate 10 service road in an eastbound direction up to the stop sign where the service road intersects the southbound lanes of Highway 108. Gary stopped at the stop sign at the intersection of the service road and Highway 108, and then made a

---

[1] White testified that he always crossed the overpass in the right-hand lane just in case he would meet a car going the wrong way.

right-hand turn into the right-hand lane of the two southbound lanes of Highway 108. Gary intended to head south for a short distance on Highway 108 in order to cross the median and gain access to the northbound lanes of Highway 108. Gary recalled seeing no traffic coming from her left at the time that she turned onto Highway 108.

As White drove down the south side of the overpass, he saw the BFI truck exit the service road and turn right onto Highway 108. White acknowledged that he had seen BFI trucks doing exactly this maneuver on many prior occasions. Approaching the BFI truck, White saw Gary signal a left-turn. White let his foot off the accelerator, and, at about the same time, the BFI truck moved into the left lane of Highway 108. White applied his brakes, but because the pavement was wet, he could avoid striking the rear of the BFI truck in the area of its left corner as the BFI truck began to turn through the median area to access the northbound lanes. Gary deposed that she looked into her rear view mirror before changing lanes, and that she did not see any traffic.

LIABILITY

Counsel for the defendant argues that because of the road conditions, the presence of the overpass, and Mr. White's familiarity with the fact that BFI trucks often turned at this opening in the median using a similar route to the route Ms. Gary took, he was contributorily negligent in not being more alert and taking more precautions to avoid an accident. Defense counsel suggests that Ms. Gary pulled in to the inside lane and travelled along it for

some distance before attempting to execute the left turn through the median. The evidence simply does not preponderate to that effect. Mr. White, who gave a very straightforward account on the witness stand of how this accident occurred, testified that the truck simply angled across his lane of travel toward the crossover. Ms. Gary, whose testimony was introduced as T-1, gave a most unsatisfactory and unenlightening account of the accident. Although she claims to have been vigilant in looking through her rear view mirror before attempting to make the left hand turn, she admitted that she at no time saw Mr. White's truck. The photographs introduced as defendant's Exhibits 2A, C, and D show Mr. White's truck to be a white pickup truck which should have been very apparent. Obviously, it did not materialize out of thin air. Ms. Gary failed to keep a proper lookout. Based upon the account of Mr. White, the photographs, and the location of the debris from the pickup truck on the highway (D-2d), it is reasonable to believe that the accident occurred just as Mr. White testified. Ms. Gary did not testify that she ever travelled straight southbound in the inside lane. Her testimony in that regard appears at page 18 as follows:

> "Q. Did you ever go straight ahead in the inside lane? Were you ever in the inside lane?
>
> A. Completely?
>
> Q. Yes, going straight ahead, as opposed to a turning motion?
>
> A. I don't remember. All I know, I was in that lane and I put my signal on; and, I guess, he was going around me."

The law applicable to this case is clearly stated in *Trabeaux v. Sanchez*, 279 So.2d 793 (4th Cir. 1973), wherein the plaintiff had been travelling in the middle lane of a three lane street in New Orleans. She was struck from the rear by Mr. Sanchez' vehicle which was immediately thereafter struck by a third vehicle. Mrs. Trabeaux claimed that she had moved into the left lane from the middle lane and had stopped and been in that position for 15 to 30 seconds before the first impact. Both the trial and appellate courts rejected this testimony and concluded that she had simply moved from the middle to the left lane, in which Mr. Sanchez had been travelling, at a time when it was not safe for her to do so. In affirming a judgment that held Mrs. Trabeaux solely at fault in the accident, the court stated:

> "It is well established in our jurisprudence that when a change of lanes by a motorist immediately precedes impact, the burden of proof is on the motorist changing lanes to show compliance with LSA-R.S. 32:79(1) * * * ."

The cited statute provides in pertinent part as follows:

> "Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply.
>
> (1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

To the same effect is *Kennedy v. Mitchell Engineering*, 518 So.2d 1128 (4th Cir. 1987). This is not simply a rear-end collision wherein a presumption of fault on the part of the following motorist arises, as argued by defense counsel. This is clearly a case of invasion of a traffic lane at a time when such encroachment could not be safely made because of the presence of Mr. White's truck, all precipitated because Ms. Gary did not make a proper observation to see White's truck and forego her turn until Mr. White had passed safely by in the inside lane. There is no evidence in this case from which the court can conclude that Mr. White was partially at fault. He was proceeding well within the speed limit in a traffic lane which he had preempted some distance to the rear. Although he had seen BFI waste trucks turn through this median opening before, there is no testimony that he had previously observed the waste trucks simply cut across the inside lane from the outside lane in disregard of traffic approaching from the rear. The evidence does not establish that he should have anticipated this unwarranted movement by the BFI truck or that he was otherwise at fault in any way. The court finds that the cause of this accident was solely the fault of Ms. Gary, who was operating the waste truck in the course and scope of her employment with the defendant BFI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO LIABILITY

In accordance with the foregoing discussion, the court makes the following findings of fact and conclusions of law:

1. Mr. White and Ms. Gary were involved in an accident on April 26, 1991.

2. Mr. White was traveling southbound on Louisiana Highway 108 in the left-hand lane of travel when Ms. Gary drove her vehicle into Mr. White's lane of travel at a time when it was not safe for her to do so.

3. Mr. White collided with the rear of Ms. Gary's vehicle because of Mr. Gary's failure to observe him and forego her turn until Mr. White had passed safely by in the inside lane.

4. Mr. Gary was acting in the course and scope of her employment with defendant BFI at the time of the accident.

5. Mr. White was proceeding well within the speed limit in a traffic lane which he had preempted some distance to the rear.

6. When a change of lanes by a motorist immediately precedes impact, the burden of proof is on the motorist changing lanes to show compliance with LSA-R.S. 32:79(1).

7. A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

8. The cause of this accident was solely the fault of Ms. Gary, who was operating the waste truck in the course and scope of her employment with defendant BFI.

QUANTUM

White, a 61 year old man, suffered from cervical spondylosis[2] at the time the accident occurred, but was not symptomatic. Mechanics of the accident were that the right front of White's vehicle struck the left rear of the BFI truck. There was no apparent damage to the waste truck, and the photograph (D-2d) discloses relatively minor damages to the Ford Ranger driven by White. White testified that he went forward on impact until his chest struck his hands on the steering wheel. Immediately afterwards, his wrists and chest hurt. He also felt a little discomfort in his shoulders and neck. He did not return to work that day, and the next day he went to the hospital with stiffness in his shoulders and neck. The doctor at the hospital gave him some muscles relaxants and an anti-inflammatory medication. He then saw Dr. Fellows, his family physician, who prescribed the same type of medication as well as a cortisone shot. The only continuous problem that he had was with his shoulders and neck. He went to physical therapy for a while, and then he had an MRI. He saw a Dr. Perry, who added a stretch harness for traction, but the harness aggravated him and he stopped. Mrs. White recommended Dr. William Foster, a neurosurgeon, who treated him conservatively for a while and then performed surgery on August 10, 1992. It is noted that Mr. White worked continuously through August 9, 1992 following the accident. Dr. Foster testified that this accident caused Mr. White's pre-existing condition to become symptomatic.

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[2] Cervical spondylosis is a degenerative arthritis of the cervical spine.

Dr. Foster performed a two-level fusion on Mr. White on August 10, 1992. Mr. White had a good result from his surgery, and has done better than most. According to Dr. Foster, Mr. White had a completely uneventful and extremely successful recovery, in large measure due to his personal motivation. Following his discharge from the hospital, Dr. Foster has seen him on only two occasions, October 22, 1992 and November 5, 1992. At the first of these follow-up visits, Dr. Foster noted some stiffness and limited range of motion of the neck, which Dr. Foster observed was the desired result in a fusion operation. His comment was that Mr. White was doing quite well. He placed Mr. White on range of motion exercises and muscle strengthening exercises. The doctor commented that X-rays looked excellent, which undoubtedly signifies a successful fusion.

On November 5, 1992, Dr. Foster commended that Mr. White was doing quite well and he discharged him to return to work as of November 12, 1992. He stated that he should not perform overhead lifting or activities which would require him to extend his neck for more than a short period of time. He stated that climbing ladders and working overhead should be severely restricted. Other than this, he felt that he was able to return to work within one week.

At the trial of this case, Mr. White testified that following his surgery, his neck and shoulder condition was considerably improved. Prior to the accident, he had been in good condition, very active, performing all types of maintenance work around the house as well as yard work. He enjoyed camping, boating, woodwork, and some hunting. He had been utilizing a treadmill, bicycle,

and rowing machine. Following surgery, Mr. White stated that he could not climb vertical ladders and had to be careful about the things that he does. He has stopped rowing, because the pulling with his shoulders causes his shoulders and neck to become stiff. He can walk on his treadmill for about a mile, and then he notices some neck irritation. He stated that it takes about three times as long as it used to mow his lawn because his shoulders and neck hurt. He has not tried to hunt deer, as this requires him to climb up into a deer stand. He notices some stiffness in his neck after driving long distances. He feels that he has lost some muscle tone in his shoulders. He testified that before the accident, he had not had any problems with his neck or shoulders.

On cross-examination, defense counsel produced documents pertaining to examinations of Mr. White during routine company physicals in 1982 and 1986 (D-3 and D-4). In 1982, Mr. White checked a "yes" response to a question as to whether he ever had or had now stiffness/neuritis of the neck. By way of explanation, Mr. White wrote on the reverse of the form "have occasional stiffness in my neck." In 1986, the examining physician noted a slight decrease in range of motion on turning the neck to the right. Indeed, much time was spent in the depositions of Dr. Foster describing the extensive sternosis (narrowing) of the neural canal in the cervical area. This was occasioned by bony buildup and spurs from the spinous processes. In addition to removing disc material at both operating levels, Dr. Foster, having found herniations at both levels, removed bony and ligamentous material to allow freedom of the spinal cord within the spinal canal. Dr. Foster was quite clear that the bony changes in the

cervical spine had existed for a long time prior to the accident on April 26, 1991. According to the history that he obtained, Dr. Foster testified that the accident would have been the precipitating cause of symptoms in Mr. White's spondylitic neck. Dr. Foster testified that while this condition could in itself have caused these symptoms, since there was not history of symptoms before the accident, he would consider the accident as the catalyst which necessitated the surgery and resulting impairment.

Dr. Foster's evaluation of disability is somewhat confusing, to say the least. In his November 10, 1992 deposition, he testified as follows:

> "Q. Are you able to assess a percentage of disability on Mr. White as a result of his injury?
>
> A. Yeah. He has got about at least 30 percent permanent partial disability to his cervical spine. But as far as the cord problem, it is difficult to assess a functional disability because there is no anatomical injury that you could see. You just expect that he will continue to improve, certainly not get worse, and just keep working." (P-3A, p.43.)

At this initial deposition, also, he testified emphatically that he had discussed Mr. White's returning to work with the restrictions regarding overhead lifting and climbing in connection with his releasing him to work. The following very pertinent testimony was elicited concerning that at pages 8 and 9 of P-3A:

"Q. Okay. Do your notes reflect or let me ask you if you if you have any particular recollection – you can tell me that as well – of particular or specific problems that Mr. White discussed with you regarding his anticipated return and your restrictions that would apply to him as a result of this surgery?

A. No, sir. He felt that he could probably do his job following those restrictions and he was enthusiastic and, I might add, quite eager to return to work. He was the exception to the rule and I was enthused with the result."

Testimony from Mr. White was to the effect that Citgo would not permit him to return to work in spite of Dr. Foster's release. It is obvious that he went back to work with his release, was denied a return to employment, and then Dr. Foster was asked to furnish and did furnish a return to work slip which had conditions that were unacceptable to Citgo. (See Foster No. 1 exhibit attached to P-3B). In that exhibit, Dr. Foster wrote that Mr. White was unable to work from April 26, 1991, through the present date, which was December 1, 1992. He put in the blank "N/A" (not applicable) as to when the patient may return to work, and added that Mr. White was to avoid climbing, overhead lifting, turning of cervical spine, bending, or lifting. These limitations are much more severe than those that appear in his November 5, 1992 progress note that appears as Exhibit No. 2 to P-3A. So, between November 5, 1992 and December 1, 1992, Dr. Foster almost completely reversed his opinion from Mr. White being able to return to his prior employment with

only limited restrictions on climbing and overhead lifting to his not being able to return to work at all because he cannot turn his head, bend, or lift, apparently in any capacity. The record contains no evidence whatsoever that Dr. Foster examined Mr. White between November 5, 1992 and December 1, 1992. There is no evidence in the record as to what physical problems justify Dr. Foster's substantial change of position. It is also noted that without any examination at all, Dr. Foster testified on March 31, 1993 that instead of an "at least 30 percent" disability, Mr. White had only a 20 percent disability (See P-3B, p.30, lines 22-24). At that same time that Dr. Foster assessed Mr. White's disabilities to be less severe, he placed greater restrictions upon him. The court is troubled by Dr. Foster's inconsistent testimony.

At the time of the accident, Mr. White had been working for Citgo in excess of 37 years and had done the work of an electrical draftsman and project engineer. Mr. White's tenure with Citgo made him eligible for some type of disability retirement from Citgo. The court, in written notes made during the testimony of Mr. White, mentioned that Mr. White was nodding his head up and down, moving his neck freely without wincing, and also moved his head from side to side without any apparent problem. The evidence relating to Mr. White's inability to return to his former occupation simply does not ring true.

Mr. White testified extensively about the nature of his work. Mr. White was in a supervisory position. As a result, Mr. White no longer did any actual drafting work or at least he did very little of it. Instead, White told the people working for him what needed to be done and they would do the actual drafting. Furthermore, for the past

two years, during which time White had been on loan from Citgo to Citcon, White had been reviewing vendor files to update them. Generally, White worked in an office. His work was almost entirely sedentary. From time to time White would go into a shop area and get information on things described in the vendor files. White, however, did not go into the shop and do any actual work, he would just get information. On occasion, he would go into the field or go to a specific unit and inspect it. Once again, he did not actually work on the unit, he only verified information in or obtained information for the vendor file. The only labor he ever did in the field was to scrape away obscuring film to obtain information from metal plates on tanks in connection with his work. The only problems that White foresaw in regard to his ability to return to work involved lifting file drawers or stacks of manuals weighing 40 to 50 pounds and crawling over equipment or leaning over pumps to make inspections. He testified that these are the only aspect of the office work that would pose any problems to him based on the restrictions that have been applied. White further testified that he needs to be able to climb ladders, etc. in the event that Citgo's labor force goes on strike and he needs to perform their jobs.

White testified that in his opinion he could have gone back to work following the surgery without any problems aside from the few limited items discussed hereinabove. Indeed, White had been back at work after the occurrence of the accident between April 26, 1991 and the time of his hospital admission on August 10, 1992. During that period of time he did nothing contrary to Dr. Foster's restrictions.

This court is aware that large corporations such as Citgo have personnel who can go out, as able-bodied individuals, and make the occasional climbs to obtain information from plates on tanks or towers that Mr. White would require in his work. Further, there are such personnel who could do the lifting of drawers for Mr. White, and also Mr. White could put the empty file drawers back in the cabinets and return the files to the drawers in numbers within his lifting capacity. These are accommodations that this court feels could obviously be made in order to permit Mr. White to return to work. Additionally, under the Americans with Disabilities Act, the court feels that the law requires such accommodations of employers such as Citgo.

This court has reviewed the deposition of the plaintiff's vocational consultant, Glenn Hebert, and places little, if any, weight on many of Mr. Hebert's findings. Mr. White's job requirements at Citgo, as described by Mr. White, are very different from the job requirements upon which Mr. Hebert based his opinion. Mr. Hebert relied on the fact that climbing, overhead climbing of ladders, and climbing into towers and stacks were essential functions of Mr. White's job. This is clearly not the case. Accordingly, that portion of Mr. Hebert's testimony that is based upon these mistaken job qualifications played only a minor role in this court's decision.

In short, it is the opinion of the court, based upon the evidence, that Mr. White's not returning to work is not a result of his being disabled from his employment as a result of the negligence of BFI's driver, but because Citgo wants Mr. White retired. This is not a valid reason, in the opinion of the court, to assess damages for future loss of wages against a tortfeasor.

Mr. White is entitled to a recovery of general damages for pain, suffering, and residual disability, past, present, and future, as a result of the accident on April 26, 1991. An appropriate award for such damages is the sum of $80,000.00. Further, Mr. White is entitled to an award for past medical and hospital expenses. Counsel for plaintiff does not suggest, nor does the record substantiate, any award necessary for future medical expenses. Mr. White's medical bills related to this accident total $28,915.83. With bonuses, Dr. Charles Bettinger, plaintiff's economist, testified that Mr. White was earning $53,000.00 per year. This amounts to $4,416.67 per month. This court finds that Mr. White was incapacitated and lost earnings as a result of the accident, from August 10, 1992 until November 12, 1992, or a period [sic] three months. He is therefore entitled to the sum of $13,250.00 for loss of earnings. The court will make no award for loss of future earnings in keeping with the previous discussion. Mrs. White claims loss of consortium. She testified that she and Mr. White were married in 1959, have never separated, and had an exceptionally good marriage. She worked as a registered nurse for 35 years. She herself had a cervical fusion recently. Her lament at the trial was that she had lost her handyman. The evidence in this case, from Mr. White himself, is that it takes him three times as long to mow his yard. Since he is retired, this is not a real problem for Mr. White. His retirement also permits him to enjoy his wife's society and companionship even more than he had prior to the accident. Except for the brief period when Mr. White was hospitalized for his surgery, there is no testimony that the Whites have been separated from each other's company or required to forego any

activities in which they jointly engaged prior to the accident. The court simply does not feel that an award for loss of consortium, which is the society and companionship enjoyed before the accident, is justified under the evidence in this case. There will be no such award. Therefore, Mr. White's total damage award will be $122,165.83 plus legal interest from the date of judicial demand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO QUANTUM

As discussed hereinabove the court makes the following findings of fact and conclusions of law:

1. Mr. White suffered from cervical spondylosis at the time the accident occurred, but was not symptomatic.

2. After the accident, Mr. White developed pain and stiffness in his neck and shoulders, which problems progressively for [sic] worse despite conservative medical treatment, including anti-inflammatory medications, muscle relaxers, and physical therapy.

3. An MRI revealed a definite disc herniation with impingement on the thecal sac along with degenerative (arthritic) problems at C5-6 and to a lesser extent at C6-7.

4. Dr. Foster performed a two-level fusion on Mr. White on August 10, 1992.

5. Mr. White had a good result from his surgery, and has done better than most.

6. Mr. White worked continuously from the date of the accident until his surgery, a period of approximately 16 months.

7. Following his discharge from the hospital, Dr. Foster saw Mr. White on two occasions, October 22, 1992 and November 5, 1992.

8. On November 5, 1992, Dr. Foster commented that Mr. White was doing quite well and he discharged him to return to work as of November 12, 1992 with limitations on climbing of ladders and overhead lifting.

9. Since the accident, Mr. White can no longer perform any physical activity that is strenuous or that involves any sort of stress on the neck area, such as lifting or turning his head sharply one direction or the other; his ability to perform household-type chores and yard work has been greatly reduced.

10. While testifying, Mr. White, nodded his head up and down, moved his neck freely without wincing, and also moved his head from side to side without any apparent problem.

11. Mr. White's medical bills related to the accident total $28,915.83.

12. At the time of the accident, Mr. White had been working for Citgo in excess of 37 years and had done the work of an electrical draftsman and project engineer.

13. Mr. White's tenure with Citgo made him eligible for some type of disability retirement from Citgo.

14. Mr. White worked at Citgo in a supervisory position.

15. For the past two years White's job has consisted of reviewing vendor files.

16. Generally White works in an office.

17. White continued working at his job for 16 months without any apparent difficulty following the accident and prior to his surgery.

18. White is in better physical condition after his surgery than he was before his surgery.

19. White's physical condition does not prevent White from doing his job at Citgo.

20. Citgo can reasonably accommodate Dr. Foster's restrictions on Mr. White.

21. The Americans with Disabilities Act requires Citgo to make these accommodations.

22. Citgo would not permit White to return to work despite Dr. Foster's release.

23. Mr. White's not returning to work is not a result of his being disabled from his employment as a result of the negligence of BFI's driver, but because Citgo wants Mr. White retired.

24. Mr. White is entitled to a recovery of general damages for pain, suffering, and residual disability, past, present, and future, as a result of the accident on April 26, 1991 in the sum of $80,000.00.

25. Mr. White is entitled to an award for past medical and hospital expenses in the amount of $28,915.83.

26. Mr. White is not entitled to any award for future medical expenses.

27. Mr. White was incapacitated and lost earnings as a result of the accident in the amount of $13,250.00.

28. Mr. White is entitled to no award for loss of future earnings.

29. Mrs. White is entitled to no award for her alleged loss of consortium.

30. Mr. White's total damage award will be $122,165.83 plus legal interest from the date of judicial demand.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana this 6th day of August, 1993.

/s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE